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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1307**

State of Minnesota,
Respondent,

vs.

Darryl Jackson Johnson,
Appellant.

**Filed July 14, 2025
Affirmed in part, reversed in part, and remanded
Reyes, Judge
Concurring specially, Cochran, Judge**

Cass County District Court
File No. 11-CR-22-1431

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Benjamin T. Lindstrom, Cass County Attorney, Karl Zinkl, Assistant County Attorney,
Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Cochran, Judge; and Halbrooks,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues that the district court erred by (1) convicting him of first-degree assault of a peace officer premised upon assault-fear, an impermissible offense under Minnesota law; (2) convicting him of first-degree assault of a peace officer based on insufficient circumstantial evidence; (3) convicting him of second-degree assault with a dangerous weapon based on insufficient circumstantial evidence; (4) denying his request to instruct the jury on a lesser-included offense of obstruction of legal process; and (5) convicting him of the lesser-included offense of second-degree assault.

The Minnesota Supreme Court has stated that first-degree assault of a peace officer premised upon assault-fear is a permissible offense under Minnesota law. However, we conclude that the state presented insufficient circumstantial evidence to convict appellant of first-degree assault of a peace officer or second-degree assault with a dangerous weapon, so we reverse appellant's convictions of those offenses and remand for sentencing purposes. Finally, we affirm the district court's decision denying appellant's request to instruct the jury on obstruction of legal process as a lesser-included offense. Our reversal of appellant's convictions of first-degree assault of a peace officer and second-degree assault with a dangerous weapon renders the fifth issue moot, so we do not address it in our opinion.

FACTS

On August 15, 2022, a security officer at Cedar Lakes Casino observed appellant Darryl Jackson Johnson with a white powdery substance in his wallet. Security notified

S.M., a Leech Lake Tribal Police Department Investigator who was present at the casino. Appellant fled on his bicycle, and S.M. pursued. Appellant abandoned his bicycle and continued to flee on foot. S.M. caught appellant when appellant ran into a fence. A struggle ensued between appellant and S.M. During the struggle, appellant took a folded knife out of his pocket. S.M. forcibly removed the knife from appellant's grasp and tossed it out of appellant's reach. Assisting officers arrived and took appellant into custody.

The following day, respondent State of Minnesota charged appellant with one count of first-degree assault—use of deadly force against a peace officer premised on assault-fear (Minn. Stat. § 609.221, subd. 2 (2022)), one count of second-degree assault—dangerous weapon (Minn. Stat. § 609.222, subd. 1 (2022)), two counts of felony fifth-degree controlled-substance crime—possession (Minn. Stat. § 152.025, subd. 2(1) (2022)), and one count of fleeing a peace officer by a means other than a motor vehicle (Minn. Stat. § 609.487, subd. 6 (2022)).

A year and a half later, after appellant successfully moved for a new trial on issues unrelated to this appeal, he appeared for his second jury trial on these charges. The trial lasted two days. The jury instructions defined “assault” as “an act done with the intent to cause [S.M.] to fear immediate bodily harm or death.” The jury returned a guilty verdict on all five counts. The district court imposed an executed sentence of 135 months on appellant's first-degree-assault charge. The district court entered a conviction on appellant's second-degree-assault charge but did not impose a sentence. This appeal follows.

DECISION

I. First-degree assault of a peace officer premised on assault-fear is a permissible offense.¹

Appellant argues that first-degree assault of a peace officer premised on assault-fear is not a crime under Minnesota law for two reasons. First, appellant argues that, under the plain language of Minn. Stat. § 609.221, subd. 2, the legislature intentionally excluded assault-fear as a permissible basis for a charge of first-degree assault against a peace officer. Second, appellant argues that the mental state required for a first-degree assault against a peace officer is “incompatible” with the mental state required for assault-fear. These are questions of law, which this court reviews de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

Both of appellant’s arguments are foreclosed before this court because the Minnesota Supreme Court has decided this issue. In *State v. Barshaw*, the supreme court stated—albeit with no analysis provided to explain its reasoning—that, “[f]or purposes of Minn. Stat. § 609.221, subd. 2(a) [(2014)]², assault includes ‘an act done with intent to cause fear in another of immediate bodily harm or death.’” 879 N.W.2d 356, 366-67

¹10 *Minnesota Practice*, CRIMJIG 13.06 (2015) states “assault” may be defined by either assault-fear under CRIMJIG 13.01, assault-harm under CRIMJIG 13.02, or both. *State v. Dalbec*, 789 N.W.2d 508 (Minn. App. 2010), states that acting with intent to cause fear and intentionally inflicting bodily harm are alternative means by which an assault may be committed and upheld jury instructions combining these alternative means. *Dalbec*, 789 N.W.2d at 513. This court also stated that the need for a combined instruction could be eliminated by charging these alternative means for committing an assault as separate counts. *Id.* at n.3.

² Minn. Stat. § 609.221, subd. 2 (2022), uses different numbering, but the substance of the statute is the same.

(Minn. 2016) (quoting Minn. Stat. § 609.02, subd. 10, and rejecting an insufficient-evidence argument because “the events leading up to the assault support an inference that [the gun-brandishing defendant] intended to cause [a law enforcement officer] fear of bodily harm”). This court is bound by *Barshaw*, so we need not address this issue further.³

II. The state presented insufficient circumstantial evidence to convict appellant of first-degree assault of a peace officer.

Appellant argues the circumstances proved are insufficient to prove guilt because the state presented no “non-speculative explanation of the nature of the force” appellant allegedly attempted to use. Appellant also argues that the state proved insufficient circumstances to support his conviction of first-degree assault of a peace officer because the circumstances proved are consistent with the rational hypothesis that appellant did not use or attempt to use deadly force. We agree.

First-degree assault of a peace officer requires the state to prove that appellant (1) assaulted a peace officer; (2) by using or attempting to use deadly force; (3) while the peace officer is engaged in the performance of a duty imposed by law. Minn. Stat. § 609.221, subd 2. To prove the first element, the state needed to prove that appellant “assaulted” S.M. Assault is “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2022). As highlighted above, *Barshaw* provides that, for purposes of first-degree assault of a peace officer, assault “includes ‘an act done with intent to cause fear in another of immediate bodily harm or

³ Judge Cochran considers appellant’s arguments in her concurring opinion below.

death.” 879 N.W.2d at 366-67. To prove the second element, use of deadly force or attempted use of deadly force, the state needed to prove that appellant specifically intended to either use force to cause death or great bodily harm or use force he should have known would create a substantial risk of causing great bodily harm and that he took a substantial step toward attempting to using that force. Minn. Stat. § 609.17, subd. 1 (2022). Our analysis focuses on the deadly force component.

The question is whether the circumstances proved show that appellant specifically intended to use or attempted to use deadly force in a manner that caused the officer to fear death or great bodily harm. There is no direct evidence of appellant’s mental state, so the heightened circumstantial-evidence standard of review applies. *State v. Issac*, 9 N.W.3d 812, 815 (Minn. 2024). When reviewing the sufficiency of evidence, appellate courts “painstakingly review[s] the record to determine whether that evidence, viewed in the light most favorable to the verdict, was sufficient to permit the jurors to reach the verdict that they did.” *State v. Hassan*, 977 N.W.2d 633, 639-40 (Minn. 2022). Evaluating the sufficiency of circumstantial evidence is a two-step process. *Issac*, 9 N.W.3d at 815.

First, appellate courts identify the circumstances proved. *Hassan*, 977 N.W.2d at 640. To do this, the court “winnow[s] down the evidence presented at trial by resolving all questions of fact in favor of the [fact-finder’s] verdict.” *Isaac*, 9 N.W.3d at 815 (quotations omitted). This step “preserves the [fact-finder’s] credibility findings and recognizes the [fact-finder] is in a unique position to determine the credibility of the witnesses and weigh the evidence before it.” *Id.* (quotations omitted) (alteration in original).

Second, appellate courts consider “whether the reasonable inferences that can be drawn from the circumstances proved, when they are viewed as a whole and not as discrete isolated facts, are consistent with the hypothesis that the accused is guilty and inconsistent with a hypothesis the accused is not guilty.” *Id.* at 817-18. At this step, an appellate court does not defer to the fact-finder, but rather examines “the reasonableness of the inferences” for itself. *Id.* at 818 (quotations omitted). To succeed on their claim, a defendant must point to circumstances proved that are consistent with a rational theory other than guilt. *Id.*

The circumstances proved are as follows: (1) appellant fled law enforcement until he ran into a fence and could not flee any further; (2) while climbing the fence, appellant did not have a knife in either hand; (3) S.M. caught appellant, and the two engaged in a physical struggle; (4) S.M. is much larger than appellant; (5) during the struggle, and while pinned on the ground by S.M., appellant brought a folded knife out of his pocket; (6) the knife is a three-inch knife which can be opened with one hand; (7) S.M. ordered appellant to drop the knife, but appellant did not comply; (8) S.M. forcibly removed the knife from appellant’s grasp during their ongoing altercation while still pinning appellant to the ground; and (9) appellant never unfolded the knife, even though he could have unfolded it with one hand.

First, we consider whether the circumstances proved are consistent with the hypothesis that appellant is guilty. Appellant argues that the circumstances proved do not show that he used force to cause death or great bodily harm, or used force he should have known would create a substantial risk of causing great bodily harm, leaving the element of deadly force unsatisfied. We agree. It is undisputed that the knife in appellant’s hand

could be opened with one hand, but he never unfolded it and exposed the blade. We conclude that these circumstances proved and inferences from them are inconsistent with the hypothesis that appellant is guilty.

Second, we consider whether the circumstances proved are consistent with a hypothesis that appellant is not guilty. Appellant argues that the inferences drawn from the circumstances proved are consistent with a reasonable, rational hypothesis that he only intended to frighten S.M. In support of his proposed hypothesis, appellant points to the following circumstances proved and reasonable inferences: appellant attempted to flee rather than fight, and he was only thwarted when he ran into a fence, which he then tried to climb rather than engaging in a physical struggle; appellant never unfolded his knife, even though it could be unfolded with one hand; S.M. pinned appellant to the ground before appellant had the knife in his hand; and S.M. is much larger than appellant. Appellant's argument is bolstered by the fact that the state premised appellant's assault charges solely upon a theory of assault-fear, not assault-harm or attempted assault.

Under *Barshaw*, proving intent to cause fear of immediate bodily harm or death satisfies the first element of first-degree assault of a peace officer. 879 N.W.2d at 366-67; Minn. Stat. § 609.221, subd 2. But proving that appellant intended *only to frighten* S.M. is consistent with the hypothesis that appellant is not guilty because it means that appellant did not use deadly force against S.M., so the second element of first-degree assault of a peace officer is unmet. Minn. Stat. § 609.221, subd 2. We conclude that these circumstances proved and the inferences from them are consistent with the hypothesis that

appellant is not guilty because he intended only to frighten S.M. and did not use or attempt to use deadly force against S.M.

Because the circumstances proved are inconsistent with the hypothesis that appellant is guilty and are consistent with a rational hypothesis that appellant is not guilty, we reverse appellant's conviction of first-degree assault of a peace officer.

III. The state presented insufficient circumstantial evidence to convict appellant of second-degree assault with a dangerous weapon.

Appellant argues that the state presented insufficient circumstantial evidence to prove second-degree assault with a dangerous weapon because the state did not prove that appellant's knife constituted a dangerous weapon. Invoking the same legal standard and the same set of circumstances proved articulated above, we agree.

Second-degree assault with a dangerous weapon requires the state to prove that appellant (1) "assault[ed] another[,]" (2) "with a dangerous weapon." Minn. Stat. § 609.222, subd. 1 (2022). "Dangerous weapon" means (1) "any device designed as a weapon and capable of producing death or great bodily harm" or (2) "other device or instrumentality that, *in the manner it is used or intended to be used*, is calculated or likely to produce death or great bodily harm[.]" Minn. Stat. § 609.02, subd. 6 (2022) (emphasis added). "'Likely' means 'probable or reasonably expected' in the context of the manner-of-use definition of a dangerous weapon." *State v. Abdus-Salam*, 1 N.W.3d 871, 877 (Minn. 2024); *see also State v. Bradley*, 4 N.W.3d 105, 110 (Minn. 2024) (holding that broomstick was dangerous weapon when used to hit victim in the head causing injury);

State v. Patton, 414 N.W.2d 572, 574 (Minn. App. 1987) (holding defendant brandished kitchen knife in manner jury could have found was used as dangerous weapon).

In support of his argument, appellant cites *In re Welfare of P.W.F.*, 625 N.W.2d 152, 154-55 (Minn. App. 2001) (holding “[t]he state failed to meet its burden of proving that appellant’s knife was designed as a weapon.”). *P.W.F.* is factually distinguishable but procedurally similar. In *P.W.F.*, a student accidentally brought a knife to school in their backpack, left the knife in their locker during the school day, and a friend’s mother later reported the student to the school after the student had already removed the knife from the school premises. *P.W.F.*, 625 N.W.2d at 153. The student did not use or brandish the knife during a physical altercation, or even have it on their person, so the state could not make a manner-of-use argument. *Id.* at 153-55. The state, unable to make a manner-of-use argument, “had the burden to submit evidence to demonstrate that appellant’s three-inch-blade folding knife was designed as a weapon. Because the state failed to produce any evidence concerning the purpose for which the knife was designed, there is no basis to conclude that the knife is a dangerous weapon.” *Id.* at 154-55. This case presents a similar situation. At trial, the state presented no evidence that appellant’s knife was designed as a weapon. The state relied only on the manner-of-use definition, arguing that appellant used or intended to use the knife in a way that was calculated or likely to produce death or great bodily harm.

First, we consider whether the circumstances proved are consistent with the hypothesis that appellant is guilty. Appellant argues that the circumstances proved do not show that he used or intended to use the knife in a way that was calculated or likely to

produce death or great bodily harm, leaving the dangerous-weapon element unmet. We agree. It is undisputed that the knife in appellant's hand could be opened with one hand, but he never unfolded it and exposed the blade. We conclude that these circumstances proved and inferences from them are inconsistent with the hypothesis that appellant is guilty.

Second, we consider whether the circumstances proved are consistent or inconsistent with a hypothesis that appellant is not guilty. Appellant argues that inferences drawn from the circumstances proved are consistent with a reasonable, rational hypothesis that he intended only to frighten S.M. This argument is bolstered by the fact that the state premised appellant's first-degree assault charge solely upon a theory of assault-fear. The state did not attempt to prove assault-harm or attempted assault. In support of his proposed hypothesis, appellant points to the following circumstances proved and reasonable inferences: appellant attempted to flee rather than fight, and he was only thwarted when he ran into a fence, which he then tried to climb rather than engaging in a physical struggle; appellant never unfolded his knife, even though it could be unfolded with one hand; S.M. pinned appellant to the ground before appellant had the knife in his hand; and S.M. is much larger than appellant. We conclude that these circumstances proved and inferences from them are consistent with the hypothesis that appellant is not guilty because he intended only to frighten S.M. and did not use the knife in his hand in way that was calculated or likely to produce death or great bodily harm.

Because the circumstances proved are inconsistent with the hypothesis that appellant is guilty and are consistent with the rational hypothesis that appellant is not guilty, we reverse appellant's conviction of second-degree assault with a dangerous weapon.

IV. The district court did not abuse its discretion by denying appellant's request to instruct the jury on obstructing legal process.

Appellant argues that the district court abused its discretion when it denied appellant's request for a lesser-included offense instruction on obstructing legal process. We disagree.

"[Appellate courts] review the denial of a requested lesser-included offense instruction under an abuse of discretion standard." *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). Whether a crime constitutes a lesser-included offense is a question of law, which this court reviews de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). The district court "must give a lesser-included offense instruction when 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Dahlin*, 695 N.W.2d at 598.

"In determining whether one offense is necessarily included in the other, we compare the statutory elements of the two offenses." *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020) (quotations omitted). "In determining whether one offense necessarily is proved by the proof of another, the trial court must look at the statutory definitions rather than the facts in a particular case." *State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997) (quotations omitted).

First-degree assault of a peace officer requires the state to prove that appellant (1) assaulted a peace officer; (2) by using or attempting to use deadly force; (3) while the peace officer is engaged in the performance of a duty imposed by law. Minn. Stat. § 609.221, subd 2. Obstruction of legal process requires the state to prove that appellant (1) intentionally (2) obstructed, resisted, or interfered with a peace officer (3) while the officer was engaged in the performance of official duties. Minn. Stat. § 609.50, subd. 1(2) (2022). Comparing the statutory elements of these offenses, only the third element matches, so obstruction of legal process is not a lesser-included offense. *Degroot*, 946 N.W.2d at 364.

Having resolved this question on the first *Dahlin* factor, we need not address the remaining factors. *Dahlin*, 695 N.W.2d at 598. The district court did not abuse its discretion by denying appellant's request to instruct the jury on obstructing legal process as a lesser-included offense.

Affirmed in part, reversed in part, and remanded.

COCHRAN, Judge (concurring specially)

I concur with the well-reasoned opinion. I write separately to address appellant's argument that the district court erred by convicting him of first-degree assault of a peace officer under Minnesota Statutes section 609.221, subdivision 2 (2022), premised upon assault-fear. Based on the supreme court's decision in *State v. Barshaw*, 879 N.W.2d 356 (Minn. 2016), indicating that first-degree assault of a peace officer includes assault-fear, I agree that binding precedent establishes first-degree assault premised on assault-fear is a permissible offense. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (stating that court of appeals is bound by supreme court precedent), *rev. denied* (Minn. Sept. 21, 2010). But appellant's argument that first-degree assault of a peace officer premised on assault-fear is not within the scope of section 609.221, subdivision 2, seems to have merit, and this statutory-construction argument was not considered in *Barshaw*.

In *Barshaw*, the supreme court considered whether the evidence was sufficient to support Barshaw's conviction of first-degree assault of a peace officer under Minnesota Statutes section 609.221, subdivision 2(a) (2014) ("[w]hoever assaults a peace officer . . . by using or attempting to use deadly force against the officer . . . while the person is engaged in the performance of a duty imposed by law").¹ 879 N.W.2d at 365-66. The supreme court concluded that the circumstantial evidence was sufficient because

¹ This portion of the statute is substantively the same as Minn. Stat. § 609.221, subd. 2 (2022), the version of the statute at issue in appellant's case. In 2021, the legislature amended the first-degree assault statute to include assaults of peace officers that inflict great bodily harm, and assaults of peace officers while using a dangerous weapon. *See* Minn. Stat. § 609.221, subds. 3, 4 (Supp. 2021). 2021 Minn. Laws 1st Spec. Sess. ch.1, art. 2, § 31, at 1987-88.

“Barshaw raised a loaded handgun toward [the deputy] with the intent to cause [the deputy] to fear that Barshaw was going to shoot at him.” *Id.* at 368. In its analysis, the supreme court stated, broadly and without any discussion of legal authority, that assault for purposes of first-degree assault of a peace officer includes “an act done with intent to cause fear in another of immediate bodily harm or death,” the general definition of assault-fear from Minn. Stat. § 609.02, subd. 10 (2014). *Id.* at 366.

As this court recently recognized in *State v. Collins*, the supreme court’s statement in *Barshaw* that first-degree assault of a peace officer includes assault-fear was not necessary to its holding. ___ N.W.3d ___, ___, 2025 WL 1728578, at *7 (Minn. App. June 23, 2025). Barshaw’s sufficiency challenge did not require the supreme court to construe the meaning of the first-degree assault statute because Barshaw did not argue that his conduct did not meet the statutory definition of first-degree assault of a peace officer. *Cf. State v. Latino*, 15 N.W.3d 654, 658 (Minn. 2025) (“When the meaning of a statute is at issue in a sufficiency-of-the-evidence challenge, we must first interpret the statute.”). Rather, Barshaw challenged the district court’s factual finding “that he lifted his handgun toward [the deputy as] clearly erroneous,” and argued in the alternative that, “even if he did lift his handgun at [the deputy], the evidence was insufficient to support a finding that he intended to cause [the deputy] fear of immediate bodily harm.” *Barshaw*, 879 N.W.2d at 367.

Here, on the other hand, the issue of statutory construction is squarely presented: appellant argues that first-degree assault of a peace officer premised on assault-fear is not a permissible offense because the plain language of the statute limits the general definition

of assault to assaults involving the use, or attempted use, of deadly force. This is an issue of statutory construction that appellate courts review de novo. *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012). Our objective is to effectuate the intent of the legislature. *Latino*, 15 N.W.3d at 661. “When interpreting a statute, we must first determine whether the statute’s language, on its face, is clear or ambiguous.” *Fleck*, 810 N.W.2d at 307 (quotation omitted). Appellant relies on the plain language of the statute, which provides, “Whoever assaults a peace officer . . . by *using or attempting to use deadly force* against the officer . . . while the person is engaged in the performance of a duty imposed by law . . . may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$30,000, or both.” Minn. Stat. § 609.221, subd. 2 (Emphasis added). Assault is not defined in section 609.221. The general definition of “assault” in chapter 609 is “an act done with intent to cause fear in another of immediate bodily harm or death” (assault-fear) or “the intentional infliction of or attempt to inflict bodily harm upon another” (assault-harm). Minn. Stat. § 609.02, subd. 10. *See also Fleck*, 810 N.W.2d at 308 (explaining there are “two distinct forms of assault recognized by the Legislature,” assault-harm and assault-fear).² “Deadly force” is defined as “force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm.” Minn. Stat. § 609.066, subd. 1 (2022).

² The supreme court declined to address Fleck’s argument that an attempt to inflict bodily harm is a specific-intent crime because the facts involved the actual infliction of bodily harm. *Fleck*, 810 N.W.2d at 312 n.5.

Appellant argues that the plain language of section 609.221, subdivision 2, narrows or limits the general definition of assault to the intentional infliction or attempted infliction of bodily harm, in section 609.02, subdivision 10(2), because the statute requires the actor to use or attempt to use “deadly force” against an officer. This argument is persuasive, considering that subdivisions 1 and 3 of section 609.221 do not include any language requiring that the assault be accomplished “by using or attempting to use deadly force.” For example, subdivision 1 provides, “whoever assaults another and inflicts great bodily harm” Minn. Stat. § 609.221, subd. 1 (2022). And subdivision 3 provides, “whoever assaults a peace officer . . . and inflicts great bodily harm” *Id.*, subd. 3 (2022).

The conclusion that first-degree assault involving use or attempted use of deadly force against a peace officer under section 609.221, subdivision 2, does not include assaults involving fear is also consistent with the plain language of the fourth-degree assault statute, which also excludes assaults involving fear. This statute provides, “Whoever physically assaults a peace officer is guilty of a gross misdemeanor.” Minn. Stat. § 609.2231, subd. 1(b) (2022). The penalty increases to a felony if the physical assault “inflicts demonstrable bodily harm” or the assault involves the intentional throwing or transfer of “bodily fluids or feces at or onto the officer.” *Id.*, subd. 1(c) (2022). These are general-intent assault-harm crimes, requiring that the actor have the intent to commit the volitional act, but not that the actor have any specific intent. *State v. Cogger*, 802 N.W.2d 407, 410-11 (Minn. App. 2011), *rev. denied* (Minn. Mar. 28, 2012). In other words, a person cannot commit a fourth-degree assault of a peace officer by an assault involving fear because the word “physically” limits the assault to assaults involving infliction of bodily harm.

Although the holding in *Barshaw* must control our decision, I am persuaded that there is merit to appellant's argument that first-degree assault involving the use or attempted use of deadly force does not include assaults involving intent to cause fear of bodily harm.